

DIGITAL ECONOMY: IMPACT ON COMPETITION LAW IN INDIA

Shramana Dwibedi & Shivam Shukla***

ABSTRACT

Technology and internet facilities have led to a revolutionary change in the sales and marketing arena globally. This paradigm shift has enabled the creation of a digital economy whereby market and its various entities envision an online presence. The objective of this paper is to assess the changing dimensions of the market in the light of a fast changing digital economy where various competitors are vying for a greater online market share. Given the objective, it becomes important to assess whether the Indian legislation, Competition Act, 2002, designed to cater to offline markets is capable of effectively addressing issues in relation to this newly emerging domain of technology enabled markets. The second assessment question shall relate to the impact that these new digitally operating enterprises have on pre-existing offline competitors. The authors shall also delve into analyzing whether the former leads to causation of any barriers to entry in the market. This paper shall give an

* Student, 4th Year, B.A., LL.B., Symbiosis Law School, Hyderabad (shramana.dwibedi@slsh.edu.in).

** Student, 4th Year, B.A., LL.B., Symbiosis Law School, Hyderabad (shivam.shukla@slsh.edu.in).

insight into the recent judicial trend in dealing with abusive conduct alleged against such online enterprises.

1. INTRODUCTION

The world has been taken over by a new economy, the e-commerce and digital economy. Digital markets are flourishing globally today and the Indian competition market is no exception. This has been made possible by Internet which provides cost effective global access in no time. At present, digital markets are growing in various sectors like, e-wallets, e-commerce, cab aggregators etc. These mainly draw funding from investor companies. They have distinct methods of business practices from that of offline stores. Their strategies often include anti-competitive pricing and exclusivity agreements. This can potentially eliminate competition in the market. It is important to assess if the Competition Commission of India (CCI) is equipped and empowered by the present provisions of the Competition Act, 2002 to cater to challenges posed by such digitally operating enterprises or if it requires any transformation.

The main purpose of this study is to understand the impact of digital e-commerce industries on offline retail stores in the light of growing competition in the market. The present age can be well termed as one where the evolved technology is changing rapidly. The advent of the Internet has brought about a revolution in traditional business settings. The business transactions in this sector have started operating through digital platforms. The aim of the paper is to assess the impact that such digital

companies have on traditionally operating offline companies and on the competition in the market.

2. TO ASSESS THE IMPACT OF DIGITALLY OPERATING COMPANIES ON PRE-EXISTING MARKETS OF TRADITIONAL OFFLINE COMPANIES

One must first attempt to understand the underlying distinction between a digitally operating online company and the traditional brick and mortar offline retail or service providing companies. In layman's terms, this means, companies operating their business over an online interface without conducting their operations through an established proprietary retail shop are digitally operating companies, whereas the latter are traditional offline retail or service providing entities conducting their business through physical proprietary establishments.

The former sets of online companies have led to the creation of a new wave in trade and commerce in form of e-commerce. As per the definition laid down by Organization for Economic Co-operation and Development (OECD), "ecommerce is the business occurring over networks using non-proprietary protocols established through an open standard setting process."¹ The rising number of such companies has led to the advent of a new economy in India and worldwide. The OECD has described that the term 'new economy' is where the various sectors of the economy produce or intensely use new technologies, with an increasing dependence on

¹ Directorate For Financial, Fiscal And Enterprise Affairs Committee On Competition Law And Policy, *Competition Issues in Electronic Commerce*, DAF/CLP(2000)32 (Jan. 23, 2000), available at <https://www.oecd.org/daf/competition/sectors/1920373.pdf> (last visited Apr. 13, 2019).

computers, telecommunications and the Internet.² Online businesses primarily conduct their business through sophisticated internet technologies and offer their services and goods through various online applications.³

Impact of digitally operating companies on the traditional offline companies:

1. **Vast Consumer Access:** Internet is a boundary-less platform that provides global access and consumes minimal time and cost. The upper edge that digitally operating companies possess is that their consumer access is wider than a traditional retail shop despite the fact that both engage in providing the same services. Such is the benefit of the networking effect on the web that it allows companies to reach out to hundreds of potential consumers in no time at all. While a traditional company's market is limited to regional boundaries as per its location, an online company can reach out beyond such geographical limitations. In this regard, example can be cited of Zesty Bites which is a bakery founded in 2004 situated in Chandigarh. It serves international style baked treats and desserts. By way of adopting digital operation over the last few years, the bakery has seen a growth of 25% and its customer base has increased to six more cities within Punjab and Haryana.⁴ Also, 'Metcalfe's Law' proposes that the value of a communication network is proportional to the

² New Economy. (2004). In: *Glossary of Statistical Terms*. [online] OECD. available at <https://stats.oecd.org/glossary/detail.asp?ID=6267> (last visited Apr. 13, 2019).

³ RICHARD POSNER, ANTITRUST IN THE NEW ECONOMY 4 (2000), available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1057&context=law_and_economics (last visited Apr. 13, 2019).

⁴ Lavanya Chawla, *The Conundrum of Online Retail in Competition Law*, 3 INDIAN COMPETITION L.REV. 44, 49 (2018).

square of the number of participants.⁵ This logic is brought to use by social media networks such as Facebook or WhatsApp. Their popularity increases as their consumer base increases, as more and more customers begin to use their services, this proportionally increases their profit value.

2. **Price Comparison Information:** Internet is a medium that allows easy recording and storage of information and data. The same data is easily accessible as well. Technology has also made it easier for firms to obtain information about pricing preferences and buying patterns and create different versions of the product to suit different price points.⁶ This significantly favours the online companies as they alter products according to reliable customer preference choices, based on data which they collect via Internet mediums. They also advertise products or services depending upon their internet usage history. These companies are able to track data and therefore show customer specific advertisements. This facilitates them to manufacture more efficient and competitive products to suit the consumer demands. Thus, it may lead to better sales.

3. **Heavy Discounting Policies:** In most cases, digitally operating companies receive funding from investors. They are able to utilize funds to engage in practices like deep discounting, cash-back offers and other such incentivizing schemes designed to attract new customers. This often allows them to further establish their network effect. They engage in such

⁵ Bob Briscoe A.O. et al., *Metcalfe's Law is Wrong*, IEEE SPECTRUM (July 1, 2006), [http:// spectrum.ieee.org/computing/networks/metcalfes-law-is-wrong](http://spectrum.ieee.org/computing/networks/metcalfes-law-is-wrong) (last visited Apr. 13, 2019).

⁶ GRAHAM C., COMPETITION, REGULATION AND THE NEW ECONOMY 12 (2004).

mechanisms at the cost of substantial losses⁷. Predatory Pricing means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.⁸ This is essentially done with an intention to reduce competition in the market and to eliminate competitors.⁹ An example in this regard would be of the global taxi company ‘Uber’ which made worldwide losses in the first half of 2016 of US\$ 1.27 billion (approximately Rs.86.5 billion).¹⁰ Also, the Indian taxi company ‘Ola’ reported a net loss of Rs.7.96 billion in March, 2015. The firm One97 Communications, which owns ‘PayTM’, reported a loss of Rs.15.49 billion in March, 2016.¹¹ Therefore, this clearly shows that they initially provided services to the consumers at a lower price, at the cost of their own losses, in order to attract more consumers. After they were able to build a stronghold in the market, they adopted the practice of surge pricing, so as to recover the losses that they suffered initially. As per the Foreign Direct Investment (FDI) guidelines issued by the Government in March, 2016, the automatic route of foreign investment would be available

⁷ SMRITI PARSHEERA et al., COMPETITION ISSUES IN INDIA’S ONLINE ECONOMY 4 (2017), available at https://www.nipfp.org.in/media/medialibrary/2017/04/WP_2017_194.pdf (last visited Apr. 13, 2019).

⁸ Competition Act, 2002, § 4(b).

⁹ *Id.*, § 4(2)(e)(b).

¹⁰ Eric Newcomer, *Uber Loses at Least \$1.2 Billion in First Half of 2016*, BLOOMBERG (Aug. 25, 2016), <https://www.bloomberg.com/news/articles/2016-08-25/uber-loses-at-least-1-2-billion-in-first-half-of-2016> (last visited Apr.13, 2019).

¹¹ Digbijay Mishra, *PaytmRegisters A Four Times Increase In Losses, Rs 1549 Cr For FY’16*, ECONOMIC TIMES (Dec. 13, 2016), http://economictimes.indiatimes.com/articleshow/55951679.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst. (last visited Apr. 13, 2019).

only to those e-commerce marketplaces that refrained from influencing sale prices and helped maintain a level playing field.¹²This was an attempt to curb such pricing techniques by the companies. Such lower prices automatically attract the customers to their products which leaves traditional companies in a fix as they tend to lose out on customers due to the attractive offers levied by the former. The latter companies incur heavy expenditure to make available goods and services at offline stores coupled with the standard cost of production.

4. Pricing decisions backed by intensive capital funding: As per the CCI's (Determination of Cost of Production) Regulations, 2009, CCI will generally look at the 'average variable cost' as a proxy for marginal cost to assess whether a firm is selling below cost.

The structure of the Internet based industries is different as compared to the offline ones and therefore these businesses adopt innovative pricing strategies.

Online companies adopt several techniques to obtain a first-mover advantage in the market. First mover advantage allows a company to venture into a market as a pioneer, make available its product or service to the consumers, thereby capturing significantly majority of the market share. This may most likely make the prospects of the market tilt towards the company with the largest market share. This may lead the competitors to exit the market. It also may become detrimental for the new entrants to enter the market as they may not be able to compete with the already

¹² Press Note 3, *Guidelines on Foreign Direct Investment on Ecommerce*, (2016), Ministry of Commerce & Industry, *Guidelines on Foreign Direct Investment on Ecommerce*, Press Note No 3 (Mar. 29, 2016), available at https://dipp.gov.in/sites/default/files/pn3_2016_0.pdf (last visited Apr. 13, 2019).

existing dominant firm which has a large market share. Therefore, there is a constant bid to capture the largest market share between competing firms.¹³ For example, in India, as on the present day, Uber and Ola can be seen competing aggressively to outbid the others, in the mean-time they are doling out exclusive incentives to their drivers and customers to capture the market in their favour irrespective of the fact that such is causing huge losses to them. The companies are heavily relying on their funding capital to provide incentives and deep discounts. This aggressive pricing policy could effectively lead to ouster of competing traditional cab services.¹⁴ These discounting practices sustaining over substantial periods of time has created new barriers to competition.¹⁵

5. Rationale behind predatory pricing: The companies admittedly incur short-term losses in the hope of capturing greater market share. By allowing such attractive discounts, these companies attempt to draw customers, this in turn increases their customer base.¹⁶ In India, several of the top 10 e-commerce companies employ this pricing technique to gain market share and control in the market by capturing larger customer base. It is reported that the combined losses of India's top ten e-commerce companies quadrupled in the financial year 2014-15, standing at a total of

¹³ NICHOLAS ECONOMIDES, CONCEPTS IN THE CONTEXT OF MONOPOLISTIC COMPETITION (2004), available at http://www.stern.nyu.edu/networks/Economides_Competition_Policy.pdf (last visited Apr. 13, 2019).

¹⁴ Bharat Budholia, *Digital Disruptions: A Competition Law Perspective*, 3 INDIAN COMPETITION L. REV. 1, 4 (2018).

¹⁵ ANUPAM SANGHI, COMPETITION IN THE DIGITAL ECONOMY 10 (2016).

¹⁶ Daniel L. Rubinfeld, *Antitrust Enforcement in Dynamic Network Industries*, 43 ANTITRUST BULL. 859, 880 (1998), available at https://www.law.berkeley.edu/files/dlr_enforcement.pdf (last visited Apr.13, 2019).

Rs.51.5 billion. Leading ecommerce marketplaces bore the highest proportion of these losses, Flipkart at Rs.20 billion, Amazon India at Rs.17.2 billion and Snapdeal at Rs.13.28 billion.¹⁷ During the financial year ending in March 2015, Ola's profit revenue was only Rs.3.8 billion in comparison to their total expenses of Rs.11.2 billion.¹⁸ A huge disparity between expenses and profits earned explain that the company was bearing losses to itself in order to continue providing benefits to customers and their drivers. Their intention might be to capture a greater market share in the long run. Also, e-payment wallets like PayTM, Mobikwik and Freecharge offer attractive cash-back discounts on e-transactions.¹⁹

6. Heavy Investor Backing and Fund Capital: The e-commerce firms have shown exponential growth in a very short span of time. For this reason, they draw substantial investments from investors and this builds up their fund capital. The fund can then be well utilized to recuperate for the losses arising out of predatory pricing and other promotional offers. Money is the prime requirement²⁰ in today's market structure where constant focus is on innovation and manufacturing improved goods and providing better services than their competitors to capture a greater market

¹⁷ Jharna Mazumdar, *E-commerce firms face new challenge as losses force reality check*, THE INDIAN EXPRESS (Mar. 27, 2016), available at <http://indianexpress.com/article/business/business-others/e-commerce-firms-face-new-challenge-as-losses-force-reality-check/> (last visited Apr. 13, 2019).

¹⁸ Harichandan Arakali, *Ola's ready to race ahead of the curve*, FORBES INDIA (Jun. 20, 2016), available at <http://www.forbesindia.com/printcontent/43507> (last visited Apr. 13, 2019).

¹⁹ Ajay Shah, *How to make digital payments work*, BUSINESS STANDARD (Nov. 28, 2016), available at http://www.mayin.org/ajayshah/MEDIA/2016/digital_payments.html (last visited Apr. 13, 2019).

²⁰ Ajay Shah, *India's start-ups are lazy businesses*, BUSINESS STANDARD, available at https://www.business-standard.com/article/opinion/ajay-shah-india-s-start-ups-are-lazy-businesses-116050100681_1.html (last visited Apr. 13, 2019).

share. Hence, such investors pave an easier way for the online companies. Traditional companies do not see as much investment as in the former category.

7. Common Investors affect competition in the market: The leading technology fund Tiger Global Management LLC (Tiger Global) has invested in both Flipkart and Shopclues. These businesses are in direct competition with each other.²¹ Nexus Venture Partners, another major investor in Internet businesses, holds a stake in competing firms Snapdeal and Shopclues. Other examples include the investment by Norwest Venture Partners in Quikr and Sulekha in the same market of online classifieds and Sequoia's investments in Zaakpay and Citrus in the same market of online payment gateways.²² Such interlocking structure where competing companies happen to have common investors potentially reduces the competition in the market. Such may cause the common investors from discouraging the respective companies to bring out competing or improved products into the market. This reduces competition among rivals significantly.²³

Therefore, given the above factors which are only a few among several others, one can see that the traditional companies face severe

²¹ Itika Sharma Punit, *The new global anti-Uber alliance: Ola, Lyft, Didi Kuaidi and GrabTaxi agree to ride together*, QUARTZ INDIA (Dec. 3, 2015), available at <https://qz.com/india/564795/a-new-anti-uber-alliance-strengthens-ola-lyft-didi-kuaidi-and-grabtaxi-agree-to-ride-together/> (last visited Apr. 13, 2019).

²² Mihir Dalal et al., *Sequoia Capital bets big on hyperlocal start-ups in India*, LIVEMINT (Aug. 14, 2015), available at <http://www.livemint.com/Companies/L6dVNPtc4PhbadvXeCDY5H/Sequoia-Capital-bets-big-on-hyperlocal-startups-in-India.html> (last visited Apr. 13, 2019).

²³ OECD, *Antitrust Issues Involving Minority Shareholding and Interlocking Directorates*, DAF/COMP/WP3/WD(2008)26 (Feb. 15, 2008).

losses due to heavy discounting and predatory pricing policies adopted by the online companies. The effects are such that at times it leads to elimination of competition from the market. The existing competitors are compelled to exit the market in view of such pricing policies. In the case of MCX Stock Exchange v. Competition Commission of India²⁴, National Stock Exchange was found to be abusing its dominant position through zero pricing. Through this strategy of zero pricing, NSE had affected competition. CCI ruled that if this would not have been brought under check, it could have led to MCX and other competitors to exit the market, thus leading to elimination of competition and creation of a monopoly.

3. IMPACT OF THE PRACTICES ADOPTED BY ONLINE ENTERPRISES ON NEW ENTRANTS IN THE MARKET

Predatory Pricing is one factor due to which competition in the market is threatened and potential new entrants are sufficiently discouraged from entering the market. Apart from predatory pricing, there are several other factors which affect competition. These factors are discussed below:

Bundling Agreements: Microsoft Company engaged in anti-competitive techniques of tying of products along while selling its operating systems. These are termed as bundling practices which they continued for decades. However, the same was put to a halt after a series of investigations by competition authorities across the world.²⁵

²⁴ MCX Stock Exchange v. Nat'l Stock Exchange of India, 2011 SCC OnLine CCI 52.

²⁵ Siddharth Jain et al., *E-Commerce And Competition Law Challenges And The Way Ahead*, 3 INDIAN COMPETITION L. REV. 7, 14 (2018).

Exclusivity Agreements: In the recent case of *Mohit Manglani*,²⁶ the question before the CCI was to investigate into the issue of exclusive distribution agreements between the retailers and the online retail portals. As per the information filed with the CCI, exclusive distribution agreements were entered into by companies such as Flipkart, Snapdeal and Amazon with other retailers to sell their products only on their online platform. Though CCI found nothing ant-competitive in the arrangement, it leads to a grave possibility where such exclusive agreements could oust new entrants into the market or create barriers for them. This issue of exclusivity was largely dealt in the case involving Google where Google was investigated by the competition authorities in several countries for having made its advertising platform, Google AdWords, incompatible for use by other competing ad platforms. This was essentially an attempt to exclude Google's competitors from making use of its advertising platform, as held by the Federal Trade Commission, USA.²⁷ For instance, in the *Microsoft* case²⁸, the European Commission held Microsoft guilty of having abused its dominant position in the PC operating system market by refusing to supply interoperability information to its competitors. This did not allow other competitors to use the Microsoft interface. The ratio of the case was based on the essential facilities doctrine which stated that if a company has access to a facility that cannot be duplicated and the use of

²⁶ <http://www.cci.gov.in/May2011/OrderOfCommission/262/802014.pdf>.

²⁷ FEDERAL TRADE COMMISSION, GOOGLE AGREES TO CHANGE ITS BUSINESS PRACTICES TO RESOLVE FTC COMPETITION CONCERNS (2013), available at <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc> (last visited Apr. 13, 2019).

²⁸ Case COMP/C-3/37.792 Microsoft, Commission decision dated 24 March, 2004.

the same is essential even for its competitors, the company having control over its access must allow the use of the same. This doctrine was carved out in a case of the Seventh Circuit Court in the United States²⁹, which explained essential facility to be such, the access of which is required by other players in order to compete effectively in the market. The Court referred to the following elements as being necessary to establish the applicability of the essential facilities doctrine:

1. The monopolist controls access to an essential facility;
2. The essential facility cannot be practically or reasonably duplicated;
3. Denial of the use of the facility by the monopolist; and
4. Feasibility of providing the facility.

Hence, the objective of this issue was to highlight circumstances by way of which new entrants to a particular market are threatened or dissuaded from entering.

4. ANALYZING THE EFFECTIVENESS OF THE COMPETITION ACT, 2002 IN ADDRESSING NEW KINDS OF ANTI-COMPETITIVE CONDUCT IN TECHNOLOGY ENABLED ONLINE MARKETS

Competition Commission of India formed under the Competition Act, 2002 is empowered to try cases involving abuse of dominance by enterprises. The power is given to the CCI under Section 4 of the Act. The Act defines ‘dominant position’ as a position of strength in the relevant market that allows a firm to: (i) operate independently of prevailing

²⁹ MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Circuit).

competitive forces; or (ii) affect its competitors, consumers or the relevant market in its favour.³⁰ The CCI has power to look into both anti-competitive conduct, that is, abuse of dominance and concerted actions through agreements and combinations that cause appreciable adverse effect on the competition in India.

There have been instances in the past where the actions of the Internet based businesses have been questioned before the CCI on the grounds of predatory pricing, exclusivity conditions and discriminatory tactics. Most of these cases relate to e-commerce marketplaces, online taxi aggregators, and online search advertising businesses. The CCI, however in most of the cases did not find sufficient merit to refer the matter for further investigation.

The CCI, in order to find out whether there is abuse of dominance has to go step by step.

The first step that the CCI takes is to determine a relevant market when it deals with a case relating to abuse of dominance. The concept of relevant market includes

1. Relevant Product Market- where the goods and services offered are regarded to be same and substitutes of one another.
2. Relevant Geographic Market- where the conditions in the area in which competition takes place are homogenous.

³⁰ Competition Act, 2002, § 4(2).

5. RELEVANT PRODUCT MARKET

5.1 E-COMMERCE

In case of e-commerce businesses, CCI observed that the consumers tend to compare price, product quality and other essentials like discount and shopping experience, both online and offline before making a final decision. If there is a significant increase in the price in one segment, it will make the customers to shift to the other segment. Therefore, the CCI opined that these two markets are different channels of distribution of the same product and are not two different relevant markets.³¹

Also, in a case where the informant argued that if a given book is exclusively dis-tributed through an e-commerce firm, it is not substitutable by another book distributed by brick and mortar stores, hence making it a separate relevant market. The CCI disagreed, holding that individual products cannot be construed as a relevant market by themselves. It was of the view that none of the e-commerce platforms were individually dominant in either the overall distribution market or for the online segment, and therefore an assessment of the alleged abuse of dominance by such e-commerce firms was not required.³²

In several cases filed against Google alleging abusive practices in respect of its online search and advertising business, the CCI has prima facie delineated the market for online search advertising in India as the

³¹ Ashish Ahuja v. Snapdeal, 2014 S.C.C OnLine C.C.I 65.

³² Mohit Manglani v. Flipkart, 2015 S.C.C OnLine C.C.I 61.

relevant market.³³ The CCI in doing so, has distinguished the online search market from the offline forms of advertising.

5.2 TAXI AGGREGATORS IN INDIA

In the case of taxi aggregators, the CCI held that the ‘radio cab service’ is a relevant market in itself. The CCI gave the reason that these services cannot be said to be substitutable by other modes of transport taking into account the convenience in terms of time saving, point-to-point pick and drop, pre-booking facility, ease of availability even at obscure places, round the clock availability, predictability in terms of expected waiting/ journey time etc. as relevant characteristics which cannot be found in other modes of road transport.³⁴

However, in another case filed by Meru Cabs against anti-competitive practices of Uber cabs in Kolkata, the CCI looked at the active presence of yellow- metered taxis and concluded that the radio taxis and yellow metered cabs formed part of the same relevant market.³⁵ Ease of booking yellow cabs, predictability in terms of availability and low pricing were some of the factors considered by CCI while making such an assessment. In this case, CCI observed that Uber was not in a dominant position because it faced a stiff competition from Ola in Kolkata and that Ola had a larger market share.

³³ Albion InfoTel v. Google Inc., 2014 S.C.C OnLine C.C.I 145.

³⁴ Fast Track Call Cab Pvt. Ltd. v. A.N.I Tech., 2015 S.C.C OnLine C.C.I 140.

³⁵ Meru Travel Solutions v. Uber India Systems, Case No. 81 of 2015.

6. RELEVANT GEOGRAPHIC MARKET

A relevant geographic market is one in which the conditions are homogenous in the area in which the competition takes place. For instance, the relevant geographic market for taxi aggregators will be the city where they run because most of them run only in the city and not outside it.

Internet is a wide platform which has limitless boundaries. Defining the geographical market acquires an interesting dimension in cases where Internet platforms use the customer's or merchant's location as a useful matching tool. The conditions of demand and supply of online cab hailing services, will for instance, differ drastically from one area to another. The CCI applied this logic in the taxi aggregation cases, to hold that the relevant geographic market was limited to the specific city in question. This is because the radio cabs operate within the city limits and also their regulation differs from state to state.

Therefore, we see that the use of geo-location tools to ascertain the location of potential users and target services to them can also make such businesses delineated as independent relevant market on the basis that the competitive constraints faced by such businesses are location-specific. This means that small firms providing innovative or unique services, which may often be linked to the consumer's geographic location, could well be designated as a separate relevant market, thus increasing the possibility of them being found to be dominant within that ecosystem.

7. DETERMINATION OF DOMINANT POSITION

The Competition Act under Section 4 defines dominant position as a position of strength in the relevant market that allows a firm to: (i) operate independently of prevailing competitive forces; or (ii) affect its competitors, consumers or the relevant market in its favour. Therefore, according to the wordings of the section, it is clear that the Act prohibits abuse of the dominant position which the enterprise enjoys. No one can be prosecuted just by mere dominance in the market till the time the enterprise doesn't start abusing or misusing its dominant power to cause appreciable adverse effect on competition in the market. The Raghavan Committee which was constituted by the Indian Government to recommend a suitable legislative framework on competition law clearly stated "The law should ensure that only when dominance is clearly established, can abuse of dominance be alleged. Any ambiguity on this count could endanger large efficient firms".

In *Meru Travels Solutions Private Limited v. Competition Commission of India*³⁶, the Competition Appellate Tribunal (COMPAT) clearly stated dominant position under the Act means a 'position of strength' but it "does not say that this position of strength necessarily has to come out of market share in statistical terms". COMPAT therefore ordered CCI to consider the question of dominance based on the overall picture posed by the taxi market, which would also include the funding status, global developments, network expansion strategies, and associated discounts.

³⁶ Meru Travels Solutions v. Competition Comm'n of India, Appeal No.31/2016.

The CCI has been very inconsistent in ordering investigation in matters of taxi regulators, which can be gauged from the disparity in its orders in different cases. In Bangalore, CCI adjudged that Ola had dominance based on a market share report made by third party. However, CCI did not find dominance of Ola in New Delhi and Kolkata stating that the third party reports were not authentic. COMPAT pointed out the inconsistency in CCI's approach towards the findings of these analyst reports.

8. CONCLUSION

In the light of the reasons stated in the above chapters, the authors come to the conclusion that the traditionally operating companies are at a disadvantage as against the digitally operating companies due to several reasons. The former lacks the usage of Internet and networking in their traditional retail shops, this results in limiting their market share. The e-commerce firms are heavily dependent on the facilities of the Internet which facilitates easy access to customers, thereby expanding their market access width with little cost and expenses. Also, the e-commerce giants attract sufficient funding from various investor companies, allowing it ready access to available capital for offering discount and incentives to draw consumers. All this is aimed at establishing a loyal customer base. The strategy adopted by such companies is that initial losses can be incurred by allowing below the cost price incentives as long as the end goal is served. The goal is to draw larger percentage of consumers to its products and services. For instance, taxi regulators like Ola and Uber offer

free rides and rides at cheap rates in the beginning when a new consumer makes use of their application. This is done to increase their customer base. After suffering initial losses by offering free rides and their customer base, these companies later surge the prices charged. Therefore, by surging the prices, these companies do good the losses suffered by them in the initial days of their plying. This is termed as ‘recouping of losses.’ Therefore, it is harmful not just for the competitors but also for the consumers as they are required to pay more than the actual prices. In the long run, the revenue generation from an increased customer base will recoup for the initial losses made. Such predatory pricing is not feasible to be adopted by traditional retail stores as they incur sufficient amounts to operate a brick and mortar retail shop. The premises of the shop, the rent, expenses of running of that shop which includes electricity charges mainly are not borne when conducting business through an online platform. The cost of manufacture of the goods is relatively high in the latter categories therefore. This dissuades customers to avail services from and buying goods from traditional retail shops.

In reference to predatory pricing, the structure of the Internet based industries is different as compared to the offline ones and therefore these businesses adopt innovative pricing strategies. Relatively higher fixed costs and low variable costs, makes it possible for many Internet-based businesses to adopt to a low cost pricing strategy without necessarily being predatory. Also, the CCI will need to take view on whether the average variable cost is an appropriate standard for examining the pricing strategies of businesses with network effects and if not, what the

appropriate standard should be.

Predatory pricing is possible to be carried out for a substantial period of time by companies which are extensively backed by capital funding by investors. This is true in the case of digitally operating companies. Traditional businesses or new start-ups will not be able to yield such discounts that go under the standard cost price of manufacture as they cannot rely on capital funding. Also, these digital firms cash on the popularity of some of their products by selling along with them products for which the market is not good. This essentially means that by way of tying-in arrangements or bundling arrangements, companies often sell their less popular products with their popular products. This mandates the consumers who wish to purchase only the popular product to even buy the tied in product. Exclusive arrangements on the other hand close the market for existing competitors and new entrants to the market. These are essentially detrimental to the thriving of a healthy competition in the market.

The Internet based market is a comparatively new one and more technical. CCI is working hard to tackle the various issues that come up. Much has been achieved, but CCI is still to achieve much more. In many cases, there occurs a scenario wherein more than one firms hold a dominant position in the market. All these firms indulge in anti-competitive acts. The CCI has failed to scrutinize these firms as the chapter on collective dominance is not yet observed in the existing Competition Act. Therefore, these firms though acting in an anti-competitive manner are saved from any action to be taken against them

because of the fact that there is still no provision on collective dominance in the Indian law.

9. RECOMMENDATIONS

9.1 PREDATORY PRICING BY DIGITAL COMPANIES MUST BE PENALIZED

The CCI must understand the underlying differences between a traditionally running offline store and a digital company. The latter is often funded heavily by investors as the profit margin in online operations is comparatively more than traditional retail outlets are able to offer. Cost of production and variable costs for online companies is significantly lower in online companies, therefore, securing steady profit margins for the investors. Hence, investors prefer to invest their capital in such digitally running companies. This ensures a steady flow of cash for these companies. Given this situation, when the digital company is employing deep discounting and incentive pricing to entice consumers, the offline store ends up losing on market share as consumers will definitely purchase the similar products at the lower price. Thus, it is not healthy competition, it is unfair as the offline companies do not possess such deep pockets. Hence, the CCI must penalize such pricing policies, it must not restrict itself to see whether any appreciable adverse effect under Section 19 of the Competition Act is being caused or not.

9.2 COMMITMENT DECISIONS

Commitment decisions must be undertaken by the CCI to check

potential threats to competition in the market. This is a system followed by the European Commission and the Federal Trade Commission in the United States. In this method, the Competition authorities can ask the parties to accept binding ‘commitment decisions’ even without an infringement having been established by way of cogent proof.³⁷ The FTC rules allow a party that is called upon for investigation to settle the charges made against it by signing a consent agreement, without admitting its liability. This consent agreement is in the nature of a warranty that the party will not engage in any anti-competitive act or attempt to abuse its dominant position.³⁸ The benefit of such procedure is that it consumes less time than a detailed investigation into the alleged activity of a firm or enterprise.³⁹ Even though the law in India does not confer explicit powers on the CCI to enter into such commitment settlements, the observations of the Madras High Court may be reiterated in this regard.

In the context of a settlement entered into between the parties pending an investigation before the CCI, the Court held that it is possible within the scheme of the Act to allow settlements and compromises to be reached between parties. This is subject to the Commission finding that such settlements would not (i) lead to the continuance of anti-competitive practices; (ii) allow the abuse of dominant position to continue; and (iii) be

³⁷ Article 9, Regulation (EC) No 1/2003 on the implementation of Articles 101 and 102 of the Treaty on the Functioning of the European Union.

³⁸ FEDERAL TRADE COMMISSION, A BRIEF OVERVIEW OF THE FEDERAL TRADE COMMISSION’S INVESTIGATIVE AND LAW ENFORCEMENT AUTHORITY (2008), available at <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last visited Apr. 13, 2019).

³⁹ JOAQUIN ALMUNIA, STATEMENT OF VP ALMUNIA ON THE GOOGLE ANTITRUST INVESTIGATION (2012), available at http://europa.eu/rapid/press-release_SPEECH-12-372_en.html (last visited Apr. 13, 2019).

*prejudicial to the interests of consumers or to the freedom of trade.*⁴⁰

The CCI is vested with wide powers and hence it is competent to assume such power to allow voluntary commitment agreements, this position will only be strengthened if the Parliament expressly codifies such provisions in the Act.⁴¹ In the words of the Supreme Court of India, “In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country’s economy cannot be ruled out”.⁴² Keeping this mind, the need of the hour is for the competition authorities to initiate rapid action to check the causation of any damage to the market economy.

The reports being used to assert dominance of an Internet based business should follow a robust and consistent methodology of data collection, scrutiny and analysis.

⁴⁰ Tamil Nadu Film Exhibitors Ass’n v. Competition Comm’n of India, High Court of Madras, Writ Appeal Nos. 1806 and 1807 of 2013, decided on March 27, 2015 (India).

⁴¹ Competition Act, 2002, Chapter IV.

⁴² Competition Comm’n of India v. Steel Authority of India, (2010) 10 S.C.C. 744..